

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Bradley Aaron Bianco,

Plaintiff,

v.

Warden Michael McCall,

Defendant.

No. 0:13-cv-494-RMG

ORDER

This matter is before the Court on the Report and Recommendation of the Magistrate Judge recommending that the Court dismiss this action with prejudice for lack of prosecution. (Dkt. No. 36). For the reasons set forth below, the Court agrees with and adopts the R&R as the order of the Court.

Background

Plaintiff, a state prisoner proceeding *pro se*, filed this civil action pursuant 42 U.S.C. § 1983. Pursuant to 28 U.S.C. § 636(b)(1) and Local Civil Rule 73.02(B)(2) DSC, this case was assigned to a Magistrate Judge for pretrial handling. On July 22, 2013, Defendant filed a motion for summary judgment. (Dkt. No. 23). The next day, the Magistrate Judge issued a *Roseboro* order advising Plaintiff of summary judgment procedures and the possible consequences of not responding to the motion. (Dkt. No. 24). However, Plaintiff failed to file a timely response to the motion. On August 30, 2013, the Magistrate Judge issued an order directing Plaintiff to indicate within fourteen days whether he wished to proceed with this action. (Dkt. No. 32). Again, Plaintiff failed to respond. The Magistrate Judge then issued the present R&R on September 19, 2013. (Dkt. No. 36). Plaintiff failed to file timely objections to the R&R.¹

¹ Plaintiff is aware of his duty to inform the Court of any change in his address. The Magistrate Judge informed Plaintiff of this responsibility by order dated April 4, 2013, (Dkt. No. 9), and Plaintiff informed the Court of a

Legal Standard

The Magistrate Judge makes only a recommendation to this Court. The recommendation has no presumptive weight, and the responsibility to make a final determination remains with the Court. *Mathews v. Weber*, 423 U.S. 261, 270-71 (1976). The Court is required to make a de novo determination of those portions of the R&R to which specific objection has been made, and may “accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate.” 28 U.S.C. § 636(b)(1).

Discussion

After review of the record and the R&R, the Court finds that the Magistrate Judge applied sound legal principles to the facts of this case and therefore adopts the R&R as the order of the Court. Federal Rule of Civil Procedure 41(b) permits the dismissal of an action if a plaintiff fails to prosecute or comply with a court order. A federal court may use its discretion in deciding whether to dismiss a case with prejudice. *See Davis v. Williams*, 588 F.2d 69, 70 (4th Cir. 1978). The Fourth Circuit has set forth four criteria a district court must consider in deciding whether to dismiss a case with prejudice under Rule 41(b): “(1) the degree of personal responsibility on the part of the plaintiff; (2) the amount of prejudice to the defendant caused by the delay; (3) the presence or absence of a drawn out history of deliberately proceeding in a dilatory fashion; and (4) the effectiveness of sanctions less drastic than dismissal.” *Id.* (citing *McCargo v. Hedrick*, 545 F.2d 393, 396 (4th Cir. 1976)) (quotations omitted). Here, the factors weigh in favor of dismissal. Plaintiff was provided with multiple opportunities to respond to Defendant’s motion, and his repeated failures resulted in significant delay. Further, it appears that Plaintiff,

change in his address by filing a notice with the Court on May 28, 2013, (Dkt. No. 19). Plaintiff has not updated his address since then.

proceeding *pro se*, is responsible for the delay. Thus, the Court agrees with the Magistrate Judge that dismissal is appropriate.

Conclusion

For the reasons set forth above, the Court agrees with and adopts the R&R of the Magistrate Judge as the order of the Court. (Dkt. No. 36). Accordingly, this action is dismissed with prejudice pursuant to Federal Rule of Civil Procedure 41(b).

AND IT IS SO ORDERED.


Richard Mark Gergel
United States District Court Judge

October 21, 2013
Charleston, South Carolina